

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

NOV 20 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0158
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
GARY DEVON MOORE,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071382

Honorable Frank Dawley, Judge Pro Tempore

VACATED AND REMANDED

Terry Goddard, Arizona Attorney General
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E C K E R S T R O M, Presiding Judge.

¶1 After a bench trial, the trial judge found appellant Gary Moore guilty of aggravated assault involving temporary but substantial disfigurement or injury, a class four felony. The trial court sentenced him to a substantially mitigated prison term of one year. Moore argues on appeal and the state concedes that the trial court's failure to address Moore personally in open court or obtain a written waiver of the right to trial by jury requires us to vacate his conviction. We vacate his conviction and remand for a new trial for the reasons stated below.

Factual and Procedural Background

¶2 In September 2005, Tannya M. went to Kino Hospital with a fractured jaw. Tannya testified that hospital staff called the police, who talked to her at the hospital. She identified Moore, her former boyfriend, as the person who had struck her in the jaw. Moore was charged with aggravated assault, a class four felony involving domestic violence.

¶3 At the end of a hearing on Moore's motion to dismiss the charge, at which Moore was not present, the parties discussed with the trial court the possibility of a bench trial. Moore later attended a status conference in January 2009 where his counsel moved to set the matter for a bench trial. At a subsequent status conference, which Moore did attend, the court asked Moore's attorneys if they had discussed the matter with Moore and whether Moore wished to waive his right to a jury trial. The court gave Moore a blank form entitled, Waiver of Trial by Jury, and instructed defense counsel to "[b]ring it back to me and I'll address him in court before the trial." The court then told Moore to look at the form and "ask

your attorneys any questions about it, and we'll talk about it as well. Because it's your choice to make. They can recommend this to you, but it's your decision." Moore indicated he understood.

¶4 No written waiver of the right to a jury trial appears in the record on appeal nor is there any indication on the record before us that the trial court ever addressed Moore again to confirm that he understood the specific rights he was foregoing by waiving a jury trial. After a bench trial, the court found Moore guilty as charged.

Discussion

¶5 Moore asserts the trial court committed fundamental and structural error by failing to address him personally and obtain a sufficient waiver of his right to a jury trial. Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶6 "Structural errors are defined as those errors which affect the 'entire conduct of the trial from beginning to end,'" *State v. Le Noble*, 216 Ariz. 180, ¶ 19, 164 P.3d 686, 690 (App. 2007), *quoting Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991), and "'deprive defendants of basic protections without which a criminal trial cannot reliably serve its

function as a vehicle for [determination of] guilt or innocence.”” *Henderson*, 210 Ariz. 561, ¶ 12, 115 P.3d at 605, *quoting State v. Ring*, 204 Ariz. 534, ¶ 45, 65 P.3d 915, 933 (2003). “Structural errors . . . are subject to automatic reversal.” *Le Noble*, 216 Ariz. 180, ¶ 19, 164 P.3d at 690.

¶7 “The right to a jury trial is a fundamental right secured to all persons accused of a crime by the Sixth Amendment of the United States Constitution and, in Arizona, by Article 2, [sections] 23 and 24 of the Arizona Constitution.” *State v. Baker*, 217 Ariz. 118, ¶ 6, 170 P.3d 727, 728-29 (App. 2007), *quoting State v. Butrick*, 113 Ariz. 563, 565, 558 P.2d 908, 910 (1976) (alteration in *Baker*). “Although some constitutional rights may be waived without actual knowledge of the right involved, the right to a jury trial is a fundamental right and may not be waived without the defendant’s knowledge, and absent a voluntary and intelligent waiver.” *State v. Ward*, 211 Ariz. 158, ¶ 13, 118 P.3d 1122, 1126-27 (App. 2005) (footnote omitted). Such a waiver “is valid only if the defendant is aware of the right and manifests an intentional relinquishment or abandonment of such right.” *Baker*, 217 Ariz. 118, ¶ 7, 170 P.3d at 729. To ensure this, “[b]efore accepting a waiver the court shall address the defendant personally, advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent.” Ariz. R. Crim. P. 18.1(b)(1). “[T]he complete failure of the trial court to notify and explain to a defendant the right to a jury trial and to obtain a knowing, intelligent and voluntary waiver of that right” constitutes structural error. *Le Noble*, 216 Ariz. 180, ¶ 19, 164 P.3d at 690.

¶8 Here, the state concedes the trial court failed to obtain a personal waiver and it agrees the court therefore committed structural error by proceeding with a bench trial in the absence of that waiver. On the record before us, we likewise conclude the defendant is entitled to relief notwithstanding his failure to object to the bench trial because the trial court committed fundamental, structural error when it overlooked its plan to secure a valid personal waiver from Moore.

¶9 The state asserts the proper remedy is to vacate his conviction and sentence, and remand for the purpose of determining whether Moore made a voluntary, knowing, and intelligent waiver of his right to a trial by jury. However, this court has recently held that “consistent with the approach taken by other courts, in Arizona and elsewhere, a new trial is required if an effective jury trial waiver is not apparent from the record.” *Baker*, 217 Ariz. 118, n.3, 170 P.3d at 732 n.3. The state suggests that we instead follow the approach taken in *Le Noble*. There, the court of appeals remanded the matter to the trial court “for the purpose of determining whether [the defendant] made a voluntary, knowing, and intelligent waiver of his right to [a] jury trial and [conducting] proceedings consistent with that determination.” 216 Ariz. 180, ¶ 20, 164 P.3d at 691. But here, where the parties agree that Moore did not make a “voluntary, knowing and intelligent waiver of his right to [a] jury trial,” *id.*, we fail to see what a remand for the purpose of determining the same question could possibly accomplish. Nor does the court in *Le Noble* articulate why it chose such a remedy there. Because we conclude the trial court committed structural error by failing to

secure an appropriate waiver, we remand this matter for a new trial. *See Baker*, 217 Ariz. 118, n.3, 170 P.3d at 732 n.3 (acknowledging and rejecting *Le Noble* approach).

Disposition

¶10 We vacate Moore’s conviction and remand this matter for a new trial.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge